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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.
SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM FOR THE SCREEN ACTORS GUILD IN RESPONSE TO THE CERTIORARI PETITION

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14 pp

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	4
I. THE FACIAL VALIDITY OF STANDARD FORM "MEMBERSHIP" UNION SECURITY CLAUSES	5
II. JURISDICTION OVER THE CLAIM THAT MS. MARQUEZ WAS DENIED A THIRTY-DAY GRACE PERIOD IN VIOLATION OF SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Bloom v. NLRB, 30 F.3d 1001 (8th Cir. 1994)	6
Buzenius v. NLRB, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945	5, 7, 8
Chun King Sales, Inc., 126 NLRB 851 (1960)	9
Communications Workers v. Beck, 487 U.S. 735 (1988)	6, 9
I.U.E. v. NLRB, 41 F.3d 1532 (D.C. Cir. 1994)	6
Keystone Coat, Apron & Towel Supply Co., 121 NLRB 880 (1958)	8
Nielsen v. International Ass'n of Machinsts, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997)	6
New York State Electric & Gas Corp., 135 NLRB 357 (1962)	9
Paperworkers v. Buzenius & NLRB, No. 97-945	4, 5, 7, 8, 10
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	9
Wegscheid v. Auto Workers Local 2911, 117 F.3d 986 (7th Cir. 1997)	9

STATUTE

29 U.S.C. § 8(a) (3)	3, 5, 8, 9, 10

MEMORANDUM FOR THE SCREEN ACTORS GUILD IN RESPONSE TO THE CERTIORARI PETITION

STATEMENT

The Screen Actors Guild, Inc. ("SAG") is a labor organization representing performers in the motion picture and television industry. Pet. App. 23a. In July 1994, Lakeside Productions, Inc., producer of the television show "Medicine Ball," became a signatory to the 1992 Memorandum of Agreement between SAG and the Independent Motion Picture and Television Producers. *Id.* 22a-23a. As a result of signing the Memorandum of Agreement, Lakeside became bound by a number of SAG agreements, including the SAG Codified Basic Agreement of 1989 for Independent Producers. *Id.* 23a.

The 1989 Basic Agreement contained the following "Union Security Provision":

> A. Every performer hereafter employed by any Producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any Producer, shall be a member of the Union in good standing.
>
> B. The foregoing subsection A., requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement whichever is the later; the Union and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; "first employment" meaning the first employment as a performer in the motion picture industry on or after August 10, 1948. . . . The Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, if the Producer has reasonable grounds for believing that membership in the Union was not available to such per-

former on the same terms and conditions generally applicable to other members, or if the Producer has reasonable grounds for believing that membership in the Union was denied to such performer or such performer's membership was terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union; provided, however, the Producer shall not be deemed to have such reasonable grounds for believing until he has made inquiry of the Union as to the facts.

* * * *

F. The interpretation contained in the first sentence of subsection B. of this Section 2 has been approved by an advisory opinion of the General Counsel of the National Labor Relations Board. If such approval of such sentence is changed by a ruling of such General Counsel, then the new ruling of such General Counsel shall prevail, until the same is overruled by the Board or a court of competent jurisdiction. If the Board or a court of competent jurisdiction shall change said ruling in a proceeding in which the Union is a party, then the new ruling or opinion shall prevail, until the same is reversed by a court of competent jurisdiction. [9th Cir. Excerpts of Record Dk. No. 39.] [1]

On August 31, 1994, Lakeside offered Naomi Marquez a one-line role in a "Medicine Ball" episode to be filmed on September 8. Pet. App. 23a. Ms. Marquez had previously been employed for over one month as a performer in a motion picture covered by a SAG collective bargaining agreement. *Id.* 24a. Consequently, SAG informed Lakeside's casting agent that Ms. Marquez was obliged to comply with the Union Security Provision as a condition of performing in "Medicine Ball." *Id.* In the week between Lakeside's offer to Ms. Marquez and the filming of the part she was offered, Ms. Marquez, her agents and attorneys, Lakeside's agents, and SAG and its attorney engaged in a series of telephone calls and written correspondence concerning how Ms. Marquez might meet the conditions of the Union Security Provision. *Id.* 23a-26a. The upshot was that as of September 7, Ms. Marquez had not made arrangements to make the appropriate payment to SAG under the Union Security Provision, and Lakeside offered the part to another performer. *Id.* 4a.

[1] During the pendency of this case, SAG and the Alliance of Motion Picture and Television Producers (of which Lakeside is a member) modified subsection A of the Union Security Provision by adding the following sentence:

> As defined and applied in this section, the term "member of the Union in good standing" means a person who offers to pay (and if the Union accepts the offer, pays) union initiation fees and dues and financial obligations in accordance with the requirements of the National Labor Relations Act. [Pet. App. 6a n.2.]

Ms. Marquez brought suit alleging that SAG had breached its duty of fair representation by: (1) maintaining a union security clause that speaks in terms of "membership in good standing" being a requirement for employment; (2) failing to inform her of her rights with respect to the enforcement of that clause; and (3) violating her right to a thirty-day grace period under § 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3). Pet. App. 4a. Ms. Marquez also alleged that SAG and Lakeside had breached implied terms of the collective bargaining agreements. *Id.*

Ruling on cross-motions for summary judgment, the district court (Rothstein, J.) dismissed Ms. Marquez's complaint in its entirety. Pet. App. 33a. The district court concluded that the Union Security Provision was neither facially invalid nor improperly enforced. *Id.* 28a-30a. The court also ruled that the claimed violations of NLRA § 8(a)(3) were within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). *Id.* 30a-32a.

On appeal, the Ninth Circuit affirmed the dismissal of Ms. Marquez's challenge to the facial legality of the Union Security Provision and the dismissal of her breach of contract claims. Pet. App. 6a-10a & 19a-21a. The

court of appeals also affirmed the dismissal of Ms. Marquez's grace period claim. *Id.* 10a-13a. At the same time, the court of appeals reversed the district court's summary judgment dismissing Ms. Marquez's claim that SAG had breached its duty of fair representation by failing to accurately inform her of the conditions imposed by the Union Security Provision. In this regard, the court of appeals found that there were material disputes of fact over what SAG representatives said to Ms. Marquez, to her agents and to Lakewood's agents and that the district court had failed to consider Ms. Marquez's claim that SAG had acted arbitrarily in its enforcement of the Provision. *Id.* 13a-19a. The court of appeals then remanded the case to the district court for resolution of these matters. *Id.* 19a.

ARGUMENT

The respondent Screen Actors Guild submits as follows with regard to the three questions raised by the *certiorari* petition:

(a) that the petition's first question—having to do with the validity of union security clauses phrased in terms of "membership"—is identical to the question raised by the earlier filed *certiorari* petition in *Paperworkers, et al. v. Buzenius & NLRB*, No. 97-945, and that the first question here should be disposed of in a manner consistent with the Court's disposition of the *Paperworkers v. Buzenius certiorari* petition;

(b) that the petition's second question—having to do with the scope of the exclusive primary jurisdiction of the National Labor Relations Board—is insubstantial and does not warrant this Court's review; and

(c) that the petition's third question—having to do with an employer's "indispensable party" status in a suit challenging the facial validity of a collective bargaining agreement to which the employer is a party—is likewise insubstantial since the dismissal by the courts below of Ms. Marquez's challenge to the facial validity of the agreement for want of legal merit formed the predicate for dismissing the employer as a party.

I. THE FACIAL VALIDITY OF STANDARD FORM "MEMBERSHIP" UNION SECURITY CLAUSES.

The first question presented here is identical to the question presented by the *certiorari* petition in *Paperworkers v. Buzenius*. Indeed, the *Paperworkers certiorari* petition cites the decision below here as being in conflict with the decision below there, and the instant *certiorari* petition relies upon the same conflict.

A. In *Paperworkers v. Buzenius*, the Sixth Circuit had held that "a union security clause that requires 'membership in good standing,' without concurrent definition of that term" is facially invalid. *Buzenius v. NLRB*, 124 F.3d 788, 791 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945.

In this case, the court of appeals addressed the question of whether SAG breached its duty of fair representation by "enter[ing] into a collective bargaining agreement ('CBA') with a union security term which provides: 'Every performer hereafter employed by any Producer . . . shall be a member of the Union in good standing.'" Pet. App. 6a. In that regard, "Marquez contend[ed] that the union acted arbitrarily and in bad faith in negotiating this term because unions may not legally require full union membership as a condition of employment." *Id.* Rejecting this contention, the court of appeals "affirm[ed] the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." *Id.* 10a.

Judge O'Scannlain's analysis of this issue began with the observation that "[t]he NLRA by its very terms allows the inclusion of a union security term requiring union 'membership.'" Pet. App. 6a. "At the same time," Judge O'Scannlain continued, "the concept of 'membership' in CBAs has become a term of art: unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees." *Id.* 6a-7a. But given the National Labor Relation Act § 8(a)(3)'s terms, the court of appeals held that unions

and employers are *not* required "to re-phrase their CBA's to reflect this 'financial core' limitation on the concept of 'membership,'" noting that "[t]wo of our sister Circuits have recently . . . held that terms requiring union 'membership' continue to be permissible under federal law." *Id.* 8a, citing *I.U.E. v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. International Ass'n of Machinists*, 94 F.3d 1107, 1113-15 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997).

It is very much to the point that, having sustained the district court's ruling with respect to the facial validity of the Union Security Provision, the court of appeals remanded the case for the district court to "consider[] Marquez's allegations that SAG's failure to notify all employees of their right to pay the lesser 'core' fees under [*Communications Workers v.*] *Beck*[, 487 U.S. 735 (1988),] violates the duty of fair representation." Pet. App. 16a. Expressing the opinion that "this duty may well include a requirement to inform workers of the minimal requirements with respect to the payment of only 'core' dues and fees," *id.* 17a, Judge O'Scannlain observed that "[t]hose Circuits which have upheld the facial validity of union security clauses have suggested that, because a CBA's membership requirement may be misleading, the unions have a duty to inform workers of the 'core' payment option," *id.* 16a.[2]

As the court of appeals' opinion notes, Pet. App. 8a, the Eighth Circuit's decision in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), is contrary to the decision below and to the decisions of the District of Columbia and Seventh Circuits followed in the decision below. And, as

[2] In remanding this question, the court of appeals noted that there was conflicting evidence as to "whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union," Pet. App. 14a, and as to "SAG['s] claim[] that it has an adequate system for 'notifying all nonmember employees who make payments pursuant to its union security clause of their right to object and pay only the collective bargaining portion of the agency fee,'" *id.* 17a.

the *certiorari* petition adds, Pet. 9-10, the Sixth Circuit's decision in *Paperworkers v. Buzenius*, which was issued just ten days after the decision below, is also contrary to the decisions of the District of Columbia, Seventh and Ninth Circuits.

B. Given the foregoing, we cannot dispute the *certiorari* petition's assertion that the first question presented here and the question presented in *Paperworkers v. Buzenius* is a question that has generated a deep conflict among the circuits. Nor can we dispute the proposition that the issue of the facial validity of standard form "membership" union security clauses is an important recurring federal labor law issue.

All that being so, the first question presented here should, we believe, be disposed of in conformity with the disposition of the earlier filed *Paperworkers v. Buzenius certiorari* petition. If the *Paperworkers* petition is granted, the first question presented by the petition here should, consistent with the Court's normal practice, be held pending the decision on the merits there. And, if review of the *Paperworkers* petition is denied, review of the first question presented here should likewise be denied.

To be sure, Ms. Marquez asserts that the instant case "more concretely presents" the question common to the *Paperworkers v. Buzenius certiorari* petition and the instant *certiorari* petition, "because the provision involved here requires every performer *both* 'to be "a member of the Union in good standing" *and* to pay periodic dues and initiation fees,' (App. at 2a (emphasis added))," while "[t]he compulsory unionism provision in *Buzenius* only says that employees " 'shall become and remain members of the Union in good standing' " and 'does not define "member in good standing." ' 124 F.3d at 789." Pet. 14-15.

But to make this point, Ms. Marquez distorts beyond recognition the union security clause at issue here—which does *not* in terms "require[] every performer *both* 'to be "a member of the Union in good standing" *and* to pay periodic dues and initiation fees,' (App. at 2a (emphasis

added))," Pet. 15, or " 'define "member in good standing," ' " *id.* 14.[3] Not surprisingly then, the courts below focused exclusively on the portion of the Union Security Provision that requires "[e]very performer hereafter employed by any Producer . . . shall be a member of the Union in good standing." Pet. App. 6a. And, in this respect, the clause here is identical to the clause considered by the Sixth Circuit in *Paperworkers v. Buzenius*. *See* 124 F.3d at 789 ("all employees . . . shall become and remain members of the Union in good standing as a condition of employment").

The Union Security Provision in this case is, of course, *much* more detailed than the clause at issue in *Paperworkers v. Buzenius*. But, in that regard, the clause here is *sui generis*. By contrast, the "membership" union security clause at issue in *Paperworkers v. Buzenius*, which was based on a model prescribed by the NLRB, is a standard form "membership" clause. *Compare Buzenius*, 124 F.3d at 789, *with Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 884 (1958). Thus, contrary to Ms. Marquez's assertion, the uniqueness of the union security clause here, together with the interlocutory nature of the decision below, makes this case, if anything, a less appropriate vehicle than *Paperworkers v. Buzenius* for resolving the issue dividing the circuits.

II. JURISDICTION OVER THE CLAIM THAT MS. MARQUEZ WAS DENIED A THIRTY-DAY GRACE PERIOD IN VIOLATION OF SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT.

Relying exclusively on decisions of the National Labor Relations Board construing the first proviso to NLRA § 8(a)(3), Ms. Marquez claims that she should have been allowed a new thirty-day grace period from paying union dues after being hired by Lakeside. Pet. 15-16.

[3] As we explain in note 1, *supra*, the clause here was amended during the course of this litigation to add a definition of the term "member of the Union in good standing," but that definition was not contained in the clause that covered Ms. Marquez and was not considered by the courts below.

Given the basis of this claim, the courts below "held this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3) [, and] [i]t is therefore within the primary jurisdiction of the NLRB." Pet. App. 11a, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). As Judge O'Scannlain correctly observed, "the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims in this manner." Pet. App. 12a, citing *Communications Workers v. Beck*, 487 U.S. at 743.

The law as stated by the decision below is so firmly established that Ms. Marquez is unable to cite a single decision supporting her assertion that a district court has jurisdiction over a claim resting solely on an alleged violation of NLRA § 8(a)(3), and we know of no such decision. *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997), invoked at pp. 17-19 of the *certiorari* petition, in fact, considered and dismissed as moot the entirely distinct legal question presented as the first question in the instant *certiorari* petition—the facial validity of union security clauses that speak in terms of a "membership" requirement—and only that question. Indeed, the *Wegscheid* opinion states that a "district court would *not* have jurisdiction over a claimed violation of section 8(a)(3) that [i]s not co-joined with a claimed violation of the union's duty of fair representation, or some other basis of federal jurisdiction. . . ." 117 F.3d at 989 (emphasis added).

This is, moreover, the last issue on which to make an exception to the *Garmon* rule. The NLRB law with respect to the application of § 8(a)(3)'s grace-period requirements has more than its share of complexities and subleties. *Compare, e.g., New York State Electric & Gas Corp.*, 135 NLRB 357 (1962) (clause requiring membership "within thirty days" lawful), *with Chun King Sales, Inc.*, 126 NLRB 851 (1960) (clause requiring membership

"within thirty days" *un*lawful). As the court below noted, Ms. Marquez's thirty-day grace period "claim rests squarely upon the proper interpretation of § 8(a)(3)," and "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that . . . the NLRB was designed to address." Pet. App. 13a.[4]

CONCLUSION

With respect to the first question presented, the Court should hold the petition and dispose of it consistent with the disposition in *Paperworkers v. Buzenius*, No. 97-945. With respect to the second and third questions presented, the petition should be denied.

Respectfully submitted,

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[4] The third question presented by the *certiori* petition challenges the court of appeals' "holding that Lakeside is not 'a necessary party to obtain full relief through contract reformation, *as the facial challenge to the CBA does not survive*.' (App. at 20a [emphasis added])," on the ground that "Lakeside is an indispensable party for the relief that would be appropriate should Ms. Marquez prevail on either of the first two questions presented. . . ." Pet. 20 (emphasis added).

As the court of appeals' opinion shows, the question of Lakeside's "indispensable party" status was treated not as an independent jurisdictional question of some moment but rather as one that is entirely derivative of the merits of Ms. Marquez's challenge to the facial validity of the agreement. Thus, the lower courts' dismissal of Lakeside was predicated solely on the fact that those courts had dismissed Ms. Marquez's claims challenging the facial validity of the collective bargaining agreement as being without legal merit. Pet. App. 20a.

That ruling does not present an "indispensable party" question that is worthy of this Court's review.